

ORIGINAL

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C. 20554

DOCKET FILE COPY ORIGINAL

In the Matter of )  
 )  
Reexamination of Comparative )  
Standards for New Noncommercial )  
Educational Applicants )

TO: The Commission

RECEIVED  
JAN 28 1999  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

95-31

COMMENTS OF

WAY-FM, INC.  
EAGLE'S NEST FELLOWSHIP CHURCH,  
BY THE CAPE BROADCASTING  
CHRISTIAN BROADCASTING ACADEMY  
SIDE BY SIDE, INC.  
ILLINOIS BIBLE INSTITUTE  
FRIENDSHIP COMMUNICATIONS, INC.  
TRINITY CHURCH OF THE NAZARENE  
KSBJ EDUCATIONAL FOUNDATION  
RADIO TRAINING NETWORK, INC.

A. Wray Fitch III  
Counsel for Joint Commentors

GAMMON & GRANGE, P.C.  
8280 Greensboro Drive, 7th Floor  
McLean, VA 22102-3807  
(703) 761-5000

January 28, 1999

No. of Copies rec'd  
List ABCDE

019

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

<b>In the Matter of</b>	)	
	)	
<b>Reexamination of the Comparative</b>	)	<b>MM Docket No. 95-31</b>
<b>Standards for Noncommercial</b>	)	
<b>Educational Applicants</b>	)	

**To: The Commission**

**COMMENTS**

Petitioners, WAY-FM, Inc.<sup>1</sup>; Eagle's Nest Fellowship Church<sup>2</sup>; By the Cape Broadcasting<sup>3</sup>;  
Christian Broadcasting Academy<sup>4</sup>; Side By Side, Inc.<sup>5</sup>; Illinois Bible Institute<sup>6</sup>; Friendship

---

<sup>1</sup> WAY-FM, Inc. is the licensee of NCE stations: WAYJ-FM, Fort Myers, Florida; WAYF-FM, West Palm Beach, Florida; WAYM-FM, Columbia, Tennessee. WAY-FM, Inc. or its predecessor Southwest Florida Community Radio, have pending applications for new FM noncommercial stations on Channel 201C3, Harvest, Alabama (BPED-950413ME); on Channel 206, Westpoint, California; on Channel 205, Fort Collins, Colorado; and Channel 201, Westminster, Colorado (BPED-960521MA).

<sup>2</sup> Eagle's Nest Fellowship Church has a pending application for a new FM noncommercial station on Channel 204B1, Harrington, Delaware (BPED-980320MD).

<sup>3</sup> By the Cape Broadcasting has a pending application for a new FM noncommercial station on Channel 206B1, Cape Charles, Virginia (BPED-980320MN).

<sup>4</sup> Christian Broadcasting Academy is the licensee of noncommercial station KLYT-FM, Albuquerque, New Mexico.

<sup>5</sup> Side By Side, Inc. is the licensee of noncommercial stations WYSZ(FM), Maumee, Ohio and WYSA-FM, Wauseon, Ohio; and has a pending application for a new FM noncommercial station on Channel 207A, Lima, Ohio (BPED-960528MA).

<sup>6</sup> Illinois Bible Institute, Inc. is the licensee of noncommercial stations WIBI(FM), Carlinville, Illinois; WTSG(FM), Carlinville, Illinois; WBGL(FM), Champaign, Illinois; WNLD(FM), Decatur, Illinois; WBMV(FM), Mount Vernon, Illinois; WCIC(FM), Pekin, Illinois; WSCT(FM), Springfield, Illinois; and WCRT(FM), Terre Haute, Indiana; and has pending applications for new FM noncommercial stations in Elgin, Illinois (BPED-980827ME) and Princeton, Illinois (BPED-980420MH).

Communications, Inc.<sup>7</sup>; Trinity Church of the Nazarene<sup>8</sup>; and Radio Training Network, Inc.<sup>9</sup>; KSBJ Educational Foundation<sup>10</sup> (hereinafter "Petitioners") file these Comments in the *Further Notice of Proposed Rulemaking* MM Docket No. 95-31 (released October 31, 1998) ("*Further Notice*"). The Commission extended the Comment date in this proceeding through January 28, 1999 and the Reply Comment date through February 18, 1999.

The *Further Notice* is the most recent request for Comments in a rulemaking that began in 1992 when the FCC initiated a general proceeding to explore criteria to select all mutually exclusive applicants for new broadcast facilities, including commercial and noncommercial stations. See, *Notice of Proposed Rulemaking In the Matter of Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd. 2664 (1992). The Commission, due to the dearth of comments filed in response to the 1992 rulemaking and in response to comments made in that rulemaking, initiated a *Second Further Notice of Proposed Rulemaking*, 9 FCC Rcd. 2821 (1994).

---

<sup>7</sup> Friendship Communications, Inc. is the licensee of KWOE(AM), Waterloo, Iowa; and has a pending application for a new FM noncommercial station on Channel 89.1, Hiawatha, Iowa (BPED-970123MA).

<sup>8</sup> Trinity Church of the Nazarene has pending applications for new FM noncommercial stations on Channel 213A, Lompoc, California (BPED-950324MB) and Channel 218A, Lompoc, California (BPED-960111MF).

<sup>9</sup> Radio Training Network, Inc. is the licensee of noncommercial stations WJIS(FM), Bradenton, Florida; WLPJ(FM), New Port Richey, Florida; WLFJ(FM), Greenville, South Carolina; WAFJ(FM), Belvedere, South Carolina; KWND(FM), Springfield, Missouri; and has pending applications for new FM noncommercial stations for Sebring, Florida (BPED-960307ME); Port Wentworth, Georgia (BPED-961213MD); and Hickory, North Carolina.

<sup>10</sup> KSBJ Educational Foundation, Inc. is the licensee of noncommercial station KSBJ(FM), Humble, Texas. Three of its Board members are on the Board of Mammoth Educational Foundation, Inc., an applicant for a new noncommercial FM station in Mammoth, Arizona; Morton Cochran County Educational Foundation, Inc. an applicant for a new noncommercial FM station in Morton, Texas; and Appomattox Educational Foundation, Inc. an applicant for a new noncommercial FM station in Ashland, Virginia.

The Commission then, in an effort to segregate issues dealing exclusively with noncommercial applications, issued yet another *Notice of Proposed Rulemaking* MM Docket 95-31, 10 FCC Rcd. 2877 (1995). Twenty-one comments were filed in response to that Notice. In part, due to the intervening adoption of the Balanced Budget Act of 1997,<sup>11</sup> the Commission issued this *Further Notice* seeking additional comment.

Specifically, the Commission seeks comment on the following issues related to the selection of mutually exclusive noncommercial applications:

- (a) Whether the benefit of ease of administration and quick resolution of a backlog of almost 800 mutually exclusive NCE applications favors use of lotteries;
- (b) Whether diversification preferences and preferences based on minority ownership should be used to favor certain applicants over others in lotteries;
- (c) Whether minority and diversification preferences should be based on the composition of an NCE applicant or some other standard.
- (d) Whether a preferred NCE applicant should be selected based on the highest point score;
- (e) Whether points should be allocated based on local diversity, fair distribution of service (Section 307(b)) and/or other technical considerations.
- (f) Whether other factors should be considered as a basis for allocating points;
- (g) Whether procedures should be adopted to resolve tie breakers where one or more applicant is awarded an equal number of points.

---

<sup>11</sup> See *Balanced Budget Act of 1997*, Pub. L. No. 105-33, 11 Stat. 251 (1997).

## **1. Lotteries.**

Lotteries are not in the public interest. The primary disadvantage of a lottery is that instead of selecting the best qualified applicant, an applicant is selected by chance. Even in instances where applicants are weighed to enhance the chance of being selected, the least qualified applicant in a lottery always has the possibility of prevailing. This system would only encourage applicants, who would otherwise not have a chance of prevailing, to file as many applications as possible based on the odds of eventually prevailing in some market.

## **2. Point System.**

Petitioners generally support adoption of a point system. Selection of a prevailing applicant based on points is far more likely to result in selection of the best qualified applicant than a lottery. A point system bridges the gap between a full blown comparative analysis (which is the most costly and also the most accurate method for selecting the best applicant) and a lottery (which is the most cost effective but least likely method for selecting the best applicant). The allocation of points based on easily ascertainable criteria should be relatively simple to implement with minimal burdens on the FCC and the applicants.

### **2.1 Point System Preferences.**

A clear winner in the vast majority of cases can be selected based on points for local diversity, fair distribution of service, and for other technical considerations. In the unlikely event of a tie, the tied applicants should be placed in a tie breaking lottery.

**2.1.1 Diversity.** Diversification of ownership has been and continues to be an underlying priority in allocation of broadcast services. The Supreme Court has noted that, "The widest possible dissemination of information from diverse antagonistic sources is essential to the

welfare of the public." *Metro Broadcasting vs. FCC*, 497 U.S. 547, 567 (1990). The Court has further noted that, "The Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints." *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 780 (1978). See also, *Comparative Renewal Process*, 3 FCC Rcd. 5179 (1988). The Commission has assessed demerits for ownership interests in noncommercial stations in a comparative proceeding for a new commercial FM frequency. In *Advanced Broadcast Technologies*, 5 FCC Rcd. 765 (1990), a comparative diversification demerit was assessed against Pennsylvania State University for its ownership of a noncommercial FM facility in a comparative contest for a new commercial FM frequency.

Diversification points should be awarded as follows:

(a) **Local Diversity (2 points).** Two points should be awarded to an applicant if the 1 mV/m contour of the proposed NCE station does not overlap the 1 mV/m contour of any other commonly controlled broadcast station.<sup>12</sup> The 1 mV/m contour, as opposed to the principal community contours (proposed in the Commission's *Further Notice*) is the preferred way of measuring local diversity. Unlike commercial broadcasters, noncommercial applicants need only to provide a 1 mV/m contour over the proposed city of license. The 1 mV/m contour, therefore, is a more accurate predictor of an applicant's market.

(b) **Diversity (1 point).** The Commission has proposed no preferences for applicants with no or relatively few other media interests. Under the Commission's proposal, all else being equal, an applicant with 50 other stations would be put on the same footing as an applicant with no

---

<sup>12</sup> In the case of nonprofit corporate applicants, common control should be based on the Board. If a majority of the directors are the same on both Boards there is common control.

other stations. Failure to differentiate between very large group owners and smaller broadcasters flies in the face of years of directives to promote diversity. Petitioners believe recognition is warranted for a significant disparity in diversification. In fact, it appears that a relatively small number of large group owners is responsible for filing the vast majority of applications for new noncommercial educational stations.<sup>13</sup> Applicants with less than 15 stations should be awarded 1 point.<sup>14</sup> This would promote diversification with a minimal down side. Given the high 15 station threshold for a diversification preference, there should be little impact on state networks.

#### **2.1.2 Fair Distribution of Service.**

Section 307(b) of the Communications Act, 47 USC §307(b) provides for the fair, efficient, and equitable distribution of service among communities.<sup>15</sup> This factor has been so significant in past NCE comparative proceedings, that analysis under this provision was usually dispositive. Indeed, Hearing Designation Orders released after the freeze on processing noncommercial stations, proposed deciding pending mutually exclusive proceedings based on 307(b) as a way of resolving some of the back-logged cases. *See Santa Monica Community College District*, 11 FCC Rcd 1123 (February 1, 1996); *Hearing Designation Order (Jena, Louisiana)* DA 97-379, 12 FCC Rcd. 17828

---

<sup>13</sup> As of May 5, 1997, American Family Association was the permittee or licensee of 19 noncommercial FM stations and had 132 applications pending for new noncommercial educational stations. As of today, those numbers are much higher. As of March 19, 1998, Broadcasting for the Challenged, Inc. had 38 applications pending for noncommercial TV or radio stations. There are other large group owners that have many pending applications as well.

<sup>14</sup> In calculating the number stations, translators or other secondary services would not be included. Construction permits for full power stations would be included.

<sup>15</sup> Section 307(b) requires the Commission to "make such distribution of licenses...among the several states and communities as to provide a fair, efficient and equitable distribution of radio service..." 47 USC §307(b).

(February 24, 1997). Petitioners generally support the Commission's proposed allocation of points under §307(b):

(i) (1 point) First local service license to the community;

(ii) (1 point) Second full time aural or second full time video service received within the 1 mV/m contour or TV grade B contour. This preference should not be limited to service received in the community of license, otherwise anomalous results could occur where an applicant providing second service to a large number of individuals in its viewing or listening area receives no preference simply because the proposed community of license happens to have two or more existing services. Furthermore, preferences should be limited to a second service, not for provision of a second NCE service. The Commission already considers noncommercial and commercial stations in determining first transmission service. *See Valley Broadcasters, Inc.*, 5 FCC Rcd. 2785, 2788 (1990), (requiring commercial and noncommercial stations to be considered when determining available transmission services, "The regulations governing noncommercial radio have changed markedly" since the early 1970s and "now all noncommercial educational stations have an obligation to serve the significant programming needs of their communities."); *See also, Channel 32 Broadcasting Company*, 6 FCC Rcd. 5188 (1991). It would be arbitrary and capricious to draw a distinction between NCE and commercial service.

(iii) (2 points) First full time aural or video service received within the stations 1 mV/m or grade B contour. Preferences should not be limited to first NCE service received in the proposed community of license for the same reason noted above.



(d) **Superior Coverage (1 point).** Petitioners agree with the Commission's proposal to award a point for superior coverage, defined as 10% more area and 10% more people.<sup>16</sup>

**3. Holding Period.**

The Commission tentatively concludes that there should be a holding period for NCE licenses awarded on the basis of a lottery or point system. Petitioners support the imposition of a holding period in all cases where there is more than one applicant for a station. Adoption of any point system or lottery preference would be meaningless if some sort of holding period is not imposed. Petitioners support a three year holding period. Any sale during this period would be limited to reimbursement of expenses. In addition, any station sold by an applicant during the holding period, absent a compelling reason, should result in a 1 point forfeiture in any future NCE proceeding. The proposed three year period seems the best balance between undue restriction on alienation and ensuring a licensee's commitment to a station. The three year period should begin on initiation of program tests.

---

<sup>16</sup> WAY-FM, Inc. supports award of 2 points for superior coverage.

-- 9 --

Respectfully submitted,

**WAY-FM, INC.  
EAGLE'S NEST FELLOWSHIP CHURCH  
BY THE CAPE BROADCASTING  
CHRISTIAN BROADCASTING ACADEMY  
SIDE BY SIDE, INC.  
ILLINOIS BIBLE INSTITUTE, INC.  
FRIENDSHIP COMMUNICATIONS, INC.  
TRINITY CHURCH OF THE NAZARENE  
KSBJ EDUCATIONAL FOUNDATION  
RADIO TRAINING NETWORK, INC.**

**GAMMON & GRANGE, P.C.**  
8280 Greensboro Drive, 7th Floor  
McLean, VA 22102-3807  
(703) 761-5000

January 28, 1999


[O:\AWF\COMMENTS.NCE]

By   
A. Wray Fitch III  
Its Counsel

**CERTIFICATE OF SERVICE**

I, Millie Adams, in the law offices of Gammon & Grange, P.C., hereby certify that I have sent this 28th day of November 1998, by first-class, postage prepaid, U.S. Mail, copies of the foregoing COMMENTS to the following:

Ms. Judy Boley  
Federal Communications Commission  
445 12th Street, S.W., Room 234  
Washington, D.C. 20554

  
\_\_\_\_\_  
Millie Adams